Contemporary Comment

Addressing Family Violence through Visa Sponsor Checks: A Step in the Right Direction?

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Abstract

In 2017, the Migration Amendment (Family Violence and Other Measures) Bill 2016 (Cth) was reintroduced. The Bill proposes to mandate character checks for people seeking to sponsor family visa applications and to refuse sponsorship applications on grounds of conviction for various offences relating to abuse and family violence. With reference to the Senate Legal and Constitutional Affairs References Committee inquiry into the Bill, this comment outlines the current visa sponsoring requirements, and identifies the implications, impact and limitations of the proposed measures, exploring whether they will in fact offer protection from family violence experienced by women without permanent status in, or outside of, Australia.

Keywords: migration – regulation – visa – sponsorship – family violence

Introduction

In early 2016, the Turnbull Government introduced the Migration Amendment (Family Violence and Other Measures) Bill 2016 (Cth) ('Migration Amendment Bill'), a piece of legislation that seeks to mandate character checks for anyone seeking to sponsor a family visa application (Minister for Immigration and Border Protection ('MIBP') 2016). This Bill aims to ensure that the Department of Immigration and Border Protection ('the Department') can 'refuse sponsorship applications in circumstances where the sponsor has convictions for pedophilia, other offences against children or offences relating to violence' (MIBP 2016). The amendment to the legislation follows the commitment in the Second National Plan to Reduce Violence against Women and their Children, Action Item 11, to require 'additional information disclosure by the Australian husband or fiancé applying for an overseas spouse visa' (Department of Social Services ('DSS') 2013, p. 25). On 17 March 2016 the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee') for inquiry and report; however, due to the dissolution of the Parliament for the 2016 election in July, the Inquiry lapsed. In the wake of the re-election of the Turnbull

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Government, the Bill was re-introduced into the Senate in September 2016 and the Committee's Inquiry was reopened briefly for additional submissions. In total, 14 submissions were made over the two time periods. The Report of the Committee endorsed the Bill, with one dissenting position (Legal and Constitutional Affairs Legislation Committee 2016). While at the time of writing it remains a Bill, it is important to note that alongside this legislation the *Migration Legislation Amendment (2016 Measures No 3) Regulation 2016* (Cth) was processed on 1 September 2016. This amendment pre-empts the Bill, putting in place a number of the processes attached to the Migration Amendment Bill regarding sponsor checks, as we detail below. At the time of the re-introduction of the Bill the Minister for Women, Senator Michaelia Cash, stated that the Bill is an important step toward protecting women and children against the very real threat of family violence (MIBP 2016). This comment identifies some of the implications and the impact of these measures, in particular considering whether this legislation offers protection in the context of family violence experienced by women without permanent status in Australia or outside of Australia.

Migrant women, family violence and partner visa applications

Accurate statistics on culturally and linguistically diverse ('CALD') women and family violence are not easily obtainable at a state, territory or national level. The absence of data in this area was noted recently in the Victorian Royal Commission into Family Violence Report (2016, volume VIII, p. 145), which identified that 'improving the data capture and quality of information in relation to … CALD communities' (among other key communities) should be a priority. What is well known is that intimate partner and family violence in CALD communities requires dedicated and specific responses tailored to the unique needs and situations of CALD women and their children. It is also critical to attend to the migration status of CALD women. This was highlighted by recent research in Victoria, undertaken as part of the Review of the Family Violence Risk Assessment & Risk Management Framework ('CRAF') Final Report (McCulloch et al. 2016), following the Victorian Royal Commission into Family Violence, which noted that migration status is one of two important risk factors for CALD women (McCulloch et al. 2016). More specifically, temporary migration is a particular point of vulnerability. Temporary migration status is broad and applies to women who are seeking asylum, those who have a provisional partner-related visa (for example, Partner (Provisional and Migrant) visa [subclass 309 100]), but also includes those who have come to Australia on a student visa or a tourist visa, for example, who during their time in Australia have formed a relationship. Our focus here is those who are partner visa applicants and/or those who plan to apply for a partner visa.

Partner visa applications can be made onshore or offshore. Since the early 1990s the number of migrants (this includes offshore and onshore applicants) applying for partner visas has increased significantly, reaching 47,825 in 2014–15 (DIBP 2015, p. 19). Of these, the majority are offshore applicants (n=28,768 or 60 per cent). The current provisions require the applicant to submit his or her application with the named sponsor agreeing to support the holder of the visa to the extent necessary while that person is a visa holder (that is, during the two-year waiting period until he or she can apply for permanent residency). Currently this is an undertaking that carries no legal weight if the person is non-compliant. Specifically, reg 1.20 of the the *Migration Regulations 1994* (Cth) ('*Migration Regulations*') obliges family sponsors to adequately maintain and accommodate the visa applicant for a period of two years (dating from the grant of the visa or the applicant's first entry into Australia, whereby after two years he or she is eligible to apply for permanent residency). Clause 9(3) of the Migration Amendment Bill proposes to impose *enforceable* statutory obligations on

sponsors. If these obligations extend to a financial requirement to be satisfied by the sponsor, it is plausible that some families will be prevented from being united. This has been seen in the United Kingdom ('UK'), in the case of *MM, Abdul Majid and Shabana Jave v Secretary of State for the Home Office* [2013] EWHC 1900 (Admin), which was presided over by the UK High Court. The Court held the financial requirement as disproportionate interference with family life, and this case law may be used as authority if mounting a challenge here in Australia if (or when) this legislation is implemented. It is also worth noting that in situations where children are attached as secondary applicants to partner visas the sponsor is already required to provide a police check. This is not the focus here.

When an application is made onshore, the applicant will be granted a bridging visa. The bridging visa comes into effect once the substantive visa ceases. The bridging visa allows the applicant to remain lawfully in Australia while awaiting the decision of the Department. An unknown percentage of applicants, onshore and offshore, are in the process of applying for a partner visa with a sponsor who is already abusing them. This discussion is focused on this group: those who do not yet have a temporary partner visa or permanent residency in Australia.

Historically there has been awareness and recognition regarding family violence and the vulnerability of women who are sponsored by Australian citizens. These concerns date from the 1980s and 1990s. For example, in a Parliamentary Research Service Background Paper published in 1992, Millbank noted that:

> Serial sponsorship has emerged as a problem because of claims of violence in these relationships, and failure to provide maintenance for former spouses and children. While the numbers of serial sponsors may be small (estimates range from 50 to a few hundred), the issue has been highly publicised, including, recently, on Couchman Over Australia (ABC Television, 15 July 1992). 'Serial Sponsorship' has to an extent become synonymous with domestic violence, and the perception that the immigration program is being used to provide some Australian men with a series of women to be exploited or abused has caused considerable concern and outrage, particularly amongst women's and ethnic organisations. Coverage of the issue in the overseas (Manila) press has also raised concern that the problem has damaged Australia's image overseas. The issue is now of public concern and there is an expectation, within the media, State Governments and the broader community that the Commonwealth Government will 'do something' to address it (Millbank 1992, p. 2).

The work of Iredale (1994) with women from Asian nations and support workers also noted that repeat sponsorship was a common phenomenon and that repeat sponsors demonstrated a high level of perpetration of various forms of domestic violence. In July 1994, the Minister for Immigration announced changes in government policy which sought to better identify and monitor so-called 'serial sponsors', although at the time it did not go as far as to *require* potential sponsors of spouses/fiances to formally disclose domestic violence and assault records as 'the Government felt that there were too many difficulties with endorsing such a legalistic approach and that there was a need to strike a balance between the rights of individuals to marriage and the protection of individuals from the consequences of their own actions' (Iredale 1994, p. 563). As part of the suite of reforms implemented, the *Migration Regulations* were amended to provide for a 'family violence exception' that enabled temporary partner visa holders to access permanent residency in circumstances where the relationship with their sponsor had ceased due to family violence. Despite these changes, concerns continued to be raised in relation to intimate partner and family violence within the context of women having temporary migration status continued to be raised (see, for example, Cunneen & Stubbs 2002 regarding homicide in this context).

The Commonwealth protections for partner visa applicants in Australia, and some other visa holders who experience family violence, known as the 'family violence provisions' remain in placed and importantly are accessible only to those on specific family or business stream visas (DIBP 2017).[1] Relevant family violence is defined in the *Migration Regulations* reg 1.21(1). The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) defines and expands the meaning of 'family violence'. These amendments inserted a new s 4AB into the *Family Law Act 1975* (Cth). Specifically, reg 1.23 outlines family violence must have occurred while the spousal or de facto relationship existed between the alleged perpetrator and his or her spouse. In order to access family violence provisions within the regulations the Department must first be satisfied that the applicant and the sponsor meet the definition of spouse or de facto partner, that is that the relationship is genuine and also has been in place for some time (*Migration Regulations* regs 1.15A and 1.09A). Assuming the Department is satisfied there is a genuine relationship,[2] and it has been established that family violence occurred while the relationship was in tact (that is, that the violence did not occur after the relationship had broken down) then family violence provisions can be accessed. The practical effect of this requirement is that if the Department deems the relationship is not genuine, or if the relationship has already ceased, subsequent family violence is irrelevant for immigration purposes, and the victim has no grounds for a permanent visa.

Senator Michaelia Cash and Peter Dutton, then Minister for Immigration and Border Protection, in a joint media release relating to this proposed Bill outlined that family violence cases amounted to two per cent of the program (MIBP 2016). These provisions are being accessed in greater numbers every year. In 2015–16, 529 successful applications to access the family violence provisions were made, compared to 458 claims made the previous year (MIBP 2016). It is a matter of record that the Department's own statistics indicate that only a very small percentage of visa holders are victims of family violence. However, in part, the introduction of the Bill is effectively aiming to reduce this by reducing the number of applicants via refusing sponsorship applications. This, as the Minister identified, is driven by a commitment to 'implementing policies to keep women arriving in Australia safe from violence' (MIBP 2016). This expectation and understanding that preventing some sponsors being approved will protect women was reflected in the details provided in the Second Action Plan, with regards to specifically targeting overseas spouse and fiancé visa applicants in terms of meeting a recognised gap in the provision of information about support services in Australia and ensuring that they are not supported to come to Australia to marry a sponsor who fails the character check (see DSS 2013, p. 25) — a marked shift from the position held in 1994. This

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1 Specifically, in the Family Stream, primary applicants for Partner (permanent) (subclass 100) visa, Spouse (permanent) (subclass 100) visa,* Interdependency (permanent) (subclass 110),* Partner (temporary and permanent) (subclasses 820/801) visas, Spouse (temporary and permanent) (subclasses 820/801) visas,* Interdependency (temporary and permanent) (subclasses 826/814).* In the Skilled stream (business): Partners of primary applicants for Established Business in Australia (subclass 845),* State/Territory Sponsored Regional Established Business in Australia (subclass 846),* Labour Agreement (subclass 855),* Employer Nomination Scheme (subclass 856),* Regional Sponsored Migration Scheme (subclass 857),* Distinguished Talent (subclass 858). *These visas have been closed to new applicants from 1 July 2009; existing applicants are covered by family violence provisions.

2 It is worth noting here that for author two, who is a practicing Migration Agent, every non-judicial family violence claim she has put forward for a client in the last three to four years has been sent to an 'independent expert', which is always one psychology group who presumably holds a contract to undertake this work. This means that in one 30-minute session (often through an interpreter) a psychologist who the victim survivor has never met makes a determination on the situation, and this determination overrides the views and submission of the treating psychologist who, in many situations, may have known the applicant intimately over a long period. These are issues for further analysis elsewhere.

discussion focuses specifically on the details of the amendment proposed to bring about this protective mechanism.

Background to the amendment

As indicated in the introduction, while the Committee review process was interrupted by the dissolution of parliament for the federal election and the Bill was reintroduced in September 2016, immediate changes to the *Migration Legislation Amendment (2016 Measures No 3) Regulation 2016* (Cth) were made in September 2016 which put in place limitations on approval of sponsorship for prospective marriage and partner visas.[3] This has given the Department/Minister the power to request a criminal record check from the sponsor and for that record to form the basis of a refusal of an application. These powers have effectively brought forward the ability for the Department to assess the sponsor, however the proposed legislation will enable the police check to be a requirement for all sponsors *before* an application is submitted. According to the Minister's office, it will ensure that the grounds for refusal are unambiguous and thus make the legislation tighter and more difficult for a decision to be challenged in the Administrative Appeals Tribunal, and it will override aspects of the Privacy Act to enable the Department to share with the potential applicant the sponsor's criminal record history, and thus the reasoning for the decision to refuse (as explained in personal communication with Ministerial office 15 September 2016).

We argue that the changes to the *Migration Regulations* indicate a commitment to realising this legislation in its current form, which preceded the Legal and Constitutional Affairs Legislation Committee report recommendation. This change, as the Australian National University College of Law Migration Program ('ANUCLMP') noted, 'represent[s] a fundamental change to Australia's family migration program with consequences extending beyond family violence' (2016, p. 2). While the reform is in line with the COAG commitment to increased scrutiny of sponsors in the visa application process, it is also in direct contradiction with the Australian Law Reform Commission's ('ALRC') 2011 *Family Violence and Commonwealth Laws — Improving Legal Frameworks* report, which, after consideration of the potential for a separate sponsorship criterion or process, concluded:

> The ALRC reiterates its view expressed in Equality Before the Law, that the 'Australian government has a special responsibility to immigrant women who are particularly vulnerable to abuse and the consequences of abuse' (p100). Rather than instituting a separate criterion for sponsorship, the ALRC considers that the safety of victims of family violence can be promoted through targeted education and information dissemination (ALRC, cited in Border Cross Observatory 2016, p. 2).

Of the 14 public submission made to the Committee regarding this Bill ten (ALRC, FECCA, MIA, IARC, LCA, ANUCMLP, SCA, Monash & InTouch, AWAVA, McAuley and WLSNSW) made direct reference to the ALRC report and recommendations, and specifically to the recommendation above, and endorsed the ALRC's 2011 position. In total, 11 of the submissions were opposed to the measures introduced in the Migration Amendment Bill. Of the other three, the DIBP endorsed the Bill, the Office of the Australian Information Commissioner simply noted the legal issues pertaining to privacy that would require further clarification, while the ALRC referred to its 2011 report without further comment. In the discussion below we bring to the fore some of the intersecting concerns raised across all of

[3] Specifically: (a) a Prospective Marriage (Temporary) (Class TO) visa; (b) a Partner (Provisional) (Class UF) visa; (c) a Partner (Temporary) (Class UK) visa (sch 6, reg 1.20KC) based on a criminal record (see reg 1.20KD for details of significant and serious criminal history definitions).

the submissions, but also point to the importance of recognising the broader and complex context of intimate partner and family violence as it impacts temporary migrant women. Our concern here is that policy is being made without consideration or consultation with women and/or agencies who support women who are are directly affected by this change.

Key considerations

The full spectrum of concerns raised across the submissions go beyond the three specific issues we focus on below: the administrative impacts of implementing amendment to the partner visa process, the variable impact on offshore and onshore applicants and the extent to which such a measure is going to accomplish the aim of protecting women from family violence. Indeed there are, as some of the submissions note, other critical issues worthy of closer examination. They include the potential breach of Australia's international obligations with regard to not interfering in interpersonal relationships and issues of fairness (and the differential interference in personal relationships when they involve a non-citizen and a citizen or permanent resident). Also of note are concerns regarding the rights of the sponsor to privacy protection and the impact of the sharing refused sponsor applicant's criminal history with the named partner visa applicant and other parties. Both New South Wales (see Wangman 2017) and the UK (see Fitz-Gibbon & Walklate 2017) have moved much further on revoking privacy rights for perpetrators in relation to family and intimate partner violence via disclosure schemes.

Does a sponsor check really identify family violence risk?

Numerous significant administrative implications arise from the proposed changes. Currently sponsors are not subject to a police check unless children are involved in the application, but under the amendments, *all* sponsors will be subject to this check. The administrative burden of this is not insignificant, and the impact of processing delays has been predicted to be substantial. This is, in part, because refusing an application will not be determined by the presence or absence of a violent criminal offence, but will be a discretionary decision whereby 'the Department will have to consider a range of factors including the length of the relationship, the type of offence and how recently it occurred, the relevance of the offence to the family relationship and any other mitigating circumstances' (MIBP 2016).

The second implication is the limitations of a sponsor check process. Family violence issues are not solely dealt with via criminal jurisdiction. While the current framework introduces a check for criminal offences, intervention orders and family safety notices (as they exist in various iterations across Australian states and territories) are not criminal offences and they will not be recognised in a police check that individuals can access via state/national police unless the intervention order has been breached (correspondence with Victoria Police 13 September 2016). There is no clarity regarding how the criminal history of an Australian permanent resident or citizen who has resided overseas for any length of time will be included in this (Federation of Ethnic Communities' Councils of Australia ('FECCA') 2016, p. 2). Arguably this measure will, at best, capture serious, serial offenders, but it only protects migrant women from these offenders (while also ensuring these women do not access this visa route to permanent residency in Australia).

Variable impact on offshore and onshore applicants

Many onshore applicants will be living with their proposed partner visa sponsors at the time of the application. What risks are posed to women in situations where the decision by the

Department is to refuse approval for a sponsor? There is a very real and informed concern that this new 'sponsorship framework may create further barriers to those already experiencing FV [family violence] and leave them more vulnerable' (FECCA 2016, p. 3), and that it may 'deter applicants from disclosing a serious offence (including family and domestic violence)' (Immigration Advice & Rights Centre ('IARC') 2016, p. 3). Such concerns are supported by the findings of the Victorian Royal Commission into Family Violence ('VRCFV') (2016) regarding immigration status and impact on women and other research (McCulloch et al. 2016). There seems to be no consideration of the impact on applicants if the *sponsor* is not approved. As the ANUCLMP noted, for intended applicants the consequence may be that they are subsequently 'liable for a visa cancellation [and] unless the person can make an application for another visa, they would be liable for detention and removal from Australia' (2016, p. 6). Many women are dependent on their partners because of their own migration status and related visa conditions (for example, women who are in Australia on a tourist visa or a student visa) which may impact, for example, their ability to work and/or to access child support if they leave the relationship because they are not permanent residents and have no formal process for accessing the family violence provisions (see Segrave 2017). These concerns suggest the potential outcomes are at odds with the intention and claimed benefit of the Migration Amendment Bill and the broader national commitment to reducing violence against women and children (IARC 2016). Indeed, the Coalition against Trafficking in Women Australia ('CATWA') submission notes 'with "unease" the characterization of the Bill as improving management of family violence' and argues that this measure fails to recognise that:

> a migrant woman who has already experienced harm from the sponsor in question will be left without recourse to the legal remedies and support services that she would otherwise be afforded had the application been processed. It is equally problematic to assume that the abusive nature of the relationship will end merely because the sponsor's application has been refused (CATWA 2016, p. 2).

We emphasise that this amendment does not equate to protection, for potential migrants or newly arrived migrants. At best it will prevent serious and identified offenders from sponsoring new partners. This in and of itself is not insignificant. However, the system is designed in a way that is not about protection. In fact, it *prevents* women from accessing permanent status in Australia. It is clear that in situations where a woman's migration status is temporary and her partner's status is permanent, that the partner has significant power (see McCulloch et al. 2016; DIBP 2016) and in some ways this type of measure appears to reaffirm this. It does not recognise that, for some women, safety and protection will never be achieved without permanent residency.

A further issue, as mentioned, is that this proposed change will directly target offshore applicants who apply for approximately 60 per cent of the partner visas lodged. The implementation of the Migration Amendment Bill as it currently stands will push a further majority of partner visa applications offshore. The Bill is explicit that a partner visa cannot be lodged prior to the related sponsorship being approved. It is assumed that there will be some mechanism in place for those arriving on a 300 prospective partner visa, which will bypass the need for the Sponsor to be approved for a second time for the 820 partner visa.[4] However, all of those on other temporary visas looking to apply onshore will be faced with the almost certain likelihood that the sponsorship approval would not be completed prior to their

[4] The Prospective Marriage Visa (subclass 300) requires the sponsor and the applicant to marry within nine months of the visa being approved. This allows the applicant and sponsor, within the nine-month period, to apply for a Partner (subclasses 820 and 801) visa (see https://www.border.gov.au/Trav/Visa-1/300-/Prospective-Marriage-visa-(subclass-300)-document-checklist).

substantive visa expiring (as there is no evidence or indication to the contrary). This would result in them being forced to depart Australia to apply for a partner visa offshore. There is no access to family violence provisions for offshore applicants. This raises an interesting question of why, if the current government is committed to reduce violence against women and their children, would it force them to apply outside of Australia where they cannot access family violence provisions?

For offshore applicants there are other considerations, but not least of these is to challenge the assumption that abuse requires the perpetrator to be in the same geographical location as the victim survivor. It is not uncommon for Australian citizen or permanent resident men to enter into relationships with women overseas, and have a child who has resulted in the relationship. Although the child was born and resides overseas, he or she is entitled to citizenship by descent or possibly a child visa to enter Australia. Under the current system, such mothers would be able to apply for a partner visa without issue even if the sponsor had a criminal record, such as the Migration Amendment Bill is trying to highlight. If these women are experiencing family violence, and even if the sponsor is a serial perpetrator, they could still come to Australia with their Australian citizen or permanent resident child and have access to family violence protections upon arrival. Under the proposed Bill, these women will never have access to family violence protections if they are unable to access permanent residency independent of their partner. This means that these amendments could result in women remaining in situations of family violence with little to no hope of escaping the abuse.

In addition, there are significant impacts of the delays described above for families that are already separated, including financial and emotional stress for partners and children involved in the wait which has consequences for Australia's commitment to upholding the *Convention on the Rights of the Child*. Article 3 of the Convention requires the best interests of the child to be a primary consideration and that appropriate legislative and administrative measures reflect this. The implementation of the Migration Amendment Bill would, in effect, prevent a child from accessing the protection necessary for his or her wellbeing due to possible forced separation from one parent as that parent must depart Australia for visa processing, or because the child is prevented from being granted a visa as his or her Australian permanent resident parent has a criminal record.

An alternative way forward

There is a need to consider the collateral damage that can be created via migration regimes that are intended to protect, but which are developed and implemented in the absence of any recognition of the migrant women's lives and/or their priorities, particularly in relation to the importance of gaining the security of permanent residency in Australia for themselves and, in many cases, for their children. We know there are many complex reasons why women stay in situations of family violence, and there are myriad social, economic and other pressures that contribute to these decisions that are specific to women whose migration status is uncertain (see Tually et al. 2008; McCulloch et al. 2016; Segrave 2017).

There was majority support in the submissions to implement the ALRC's 2011 recommendations. It is not clear why the recommendations have been ignored and the decision made to follow the path of sponsor-focused changes. Arguably the Migration Amendment Bill represents the challenges we continue to face when well-meaning legal change is developed that is not informed by the complexity of migrant women's lives. We hope that the concerns raised about this Bill do not come to fruition and we hope equally that, if and when they do, we have a legislature ready to accept that critical amendments must be made.

Case

MM, Abdul Majid and Shabana Jave v Secretary of State for the Home Office [2013] EWHC 1900 (Admin)

Legislation

Family Law Act 1975 (Cth)

Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)

Migration Amendment (Family Violence and Other Measures) Bill 2016 (Cth)

Migration Legislation Amendment (2016 Measures No 3) Regulation 2016 (Cth)

Migration Regulations 1994 (Cth)

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